No. 4946

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

KETCHIKAN LUMBER AND SHINGLE COMPANY,
a corporation,
Plaintiff in Error,

vs.

A. WALKER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

This action was brought under the provisions of the Workman's Compensation Act of Alaska, Chapter 98 of the Session Laws of Alaska of 1923.

The plaintiff in the court below, hereinafter referred to as the plaintiff, was injured as alleged in the complaint, while engaged as a sawyer in defendant's mill. The extent of his injuries and the degree of disability consequent therefrom are the only material and disputed questions in the case.

As to the extent of the injury, the attending physician testified that the second, third and fourth metacarpal bones of the right hand were cut or sawed through and all the nerves and tendons on the upper surface of the hand at the same time. Three doctors testified as to the degree of disability of the hand, resulting from the injury, one fixing it at between eighty and ninety per cent, another at ninety per cent. The third testified that the result of an examination made before sending a certificate to the insurance company showed a "practically complete disability" of the hand (T R. 40), and further testified (T R 41) as follows:

> Q. To what extent would you say the hand is now disabled?
>
> A. Well, as I explained, from an anatomic standpoint, perhaps, it is not a complete loss of the hand. There is perhaps somewhere between five and ten per cent function of the hand left; but for actual work I would say that the hand is not only completely disabled, but he is really less able to work than he would be without the hand.

On cross examination this doctor testified as follows:

> Q. The injury you have described is confined to the hand, is it?
>
> A. The hand and the consequent atrophy of the muscles of the arm. That is the worst of it.

The plaintiff testified that he is a married man,

having seven children, the oldest sixteen years of age, all dependent upon him for support. That he had never worked at any except hard labor and had no means of supporting his family except by his earnings. Prior to his injury he had never been incapacitated from manual labor and had constant employment. *Since the injury he had been unable to perform any manual labor.* That his nerves have been impaired, he is unable to rest as well as formerly, his hand pains him constantly and his arm considerably. That he is considerably weaker physically than before the accident. That for about a year after the injury he was unable to get work at all on account of his condition, but that about a month before the trial he obtained a job as night watchman at $100.00 per month, but did not know how long the job would last.

Edward C. Erikson, one of his co-employees at the time of the accident, testified that the present physical condition of the plaintiff, that is, a year after the accident, was not to be compared to his previous condition. That he was not the same man he was before, as to general ruggedness.

A fair summary of the evidence relating to plaintiff's disability is, that:

From an anatomic standpoint the hand itself has been disabled about 90%.

That for actual use in working the hand is

completely disabled.

That plaintiff is even more incapacitated from work than if he had lost the hand altogether.

That there has been atrophy of the arm consequent to the injury.

That plaintiff's general health and physical strength have been impaired and his nervous system injured.

That he suffers considerable pain.

That the injury is permanent and the chances of improvement following an operation doubtful.

On the evidence submitted the jury found that as a result of the injury the plaintiff suffered a loss of 65% of earning capacity.

ARGUMENT.

We shall consider the Specifications of Error in the order they are discussed in the brief of Plaintiff in Error.

I.

THE COURT ERRED IN PERMITTING TESTIMONY TO BE PRODUCED UPON BEHALF OF PLAINTIFF TENDING TO SHOW THE INJURY SUFFERED BY PLAINTIFF WAS CAUSED BY THE NEGLIGENCE OF THE DEFENDANT.

In paragraph four of the complaint (T R 2) without in any manner attributing negligence to the defendant, the plaintiff alleges in effect that

he was injured on account of the trim-saw of the defendant becoming out of order. This allegation was directly denied in the answer (T. R 6).

On the trial, in view of such denial, the court permitted plaintiff to testify as to the circumstances of the accident. There was no testimony offered in any way tending to show negligence on the part of the defendant, other than the plaintiff's statement that the rope holding the saw in position wore through and broke (T R 22-23).

The trial court carefully instructed the jury, both during the trial and in its written instructions, that the question of negligence did not enter into the case.

II.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NONSUIT AND INSTRUCTED VERDICT IN ITS FAVOR FOR THE REASON OF INSUFFICIENCY OF THE EVIDENCE TO SUPPORT THE ALLEGATIONS OF THE COMPLAINT AND ON ACCOUNT OF A FATAL VARIANCE BETWEEN THE PROOFS SUBMITTED AND THE PLEADINGS. (See pages 58-59.)

Conceding for the purpose of argument that plaintiff in his complaint alleged that he had suffered a total and permanent disability, as a result of the injury, and further conceding that the proof showed only a partial and permanent

disability, yet such variance under the Alaska law is not a material variance and does not amount to a failure of proof.

Sec. 919 of the Compiled Laws of Alaska is as follows:

Sec. 919. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.

The record shows that defendant could not have been misled to his prejudice by the variance complained of.

It is not correct to say, as stated in the brief of Plaintiff in Error, that plaintiff's case was based on total permanent disability.

His case was based on a personal injury, the degree of disability resulting therefrom affecting only the measure of damages.

That defendant could not have been misled is conclusively shown by its answer wherein it is alleged,

> "Plaintiff has not sustained by reason of the injury complained of in the complaint,

an injury causing greater than 75% of the loss of the hand."

Thus the only material issue in the case, viz, the degree of disability, is very clearly raised by the pleadings.

We cannot imagine in what respect the testimony of the defendant would have differed from that actually offered and introduced by it, had the plaintiff amended the complaint to conform to the facts proven at the conclusion of the plaintiff's case, instead of after the whole case was in.

There was no failure of proof.

Section 921 of the Compiled Laws of Alaska is as follows:

Sec. 921. When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

As before stated, plaintiff's cause of action was the injury to his person. The allegation of the cause of action to which the proof was directed was not unproved in its entire scope and meaning, within the meaning of Sec. 921, but only in one particular, and that particular related only to the degree of disability. A lesser degree of disability, and consequently less damages, were proven, than alleged. The defendant certainly

was not prejudiced thereby.

The burden was on the defendant to show to the satisfcation of the court, that it was misled to its prejudice, which it failed to do, as required by Sec. 919, above quoted.

III.

THE COURT ERRED IN PERMITTING THE PLAINTIFF TO AMEND THE COMPLAINT AFTER THE CONCLUSION OF THE EVIDENCE AND THE COMPLETION OF ARGUMENT TO THE JURY, WHICH AMENDMENT SUBSTANTIALLY CHANGED THE CAUSE OF ACTION.

This is substantially the same as the preceding Specification of Error.

In the situation of the case when the motion was made by plaintiff, to amend to conform to proof, the court could have, instead of allowing the amendment, disregarded the variance and allowed the case to be decided on the evidence.

Jones on Evidence Sec. 234, page 295.

The discretion of the judge in allowing or refusing these amendments will not be reviewed by any court, unless in case of manifest abuse of this discretionary power.

Jones on Evidence Sec. 233, page 294 and cases cited.

IV.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION

NUMBER FOUR AS FOLLOWS: "YOU ARE INSTRUCTED UNDER THE LAW OF ALASKA THAT ACCORDING TO THE EVIDENCE IN THIS CASE PLAINTIFF CANNOT RECOVER FOR MORE THAN THE LOSS OF A HAND."

THE COURT ERRED IN ENTERING THE JUDGMENT IN THE CASE OFFERED BY THE PLAINTIFF OVER THE OBJECTIONS OF DEFENDANT FOR THE REASON THAT THE JUDGMENT IS CONTRARY TO THE EVIDENCE AND LAW IN THE CASE AND THAT SAME WAS NOT IN ACCORDANCE WITH THE VERDICT, FINDINGS, FACTS AND LAW.

Before discussing this Specification of Error we call attention to a manifest mis-statement of proceeding which occurred at the trial, contained on page 9 of the brief of Plaintiff in Error, as follows:

> "The employe in this case originally claimed that his hand, by reason of the injury, had been totally and permanently disabled. (See par. IV COMPLAINT, page 2.) However, after all the evidence had been adduced and after the argument of counsel before the jury, the plaintiff, by his attorney, requested permission to and did amend his complaint by striking out the word 'totally' and inserting in lieu thereof the word 'partially' (T R pages 66-67). The plaintiff thereby admitted that the injury to his hand had only resulted in a partial disability. Because of this admission no reference is needed to the evidence to support our contention that

> the plaintiff's hand, as a matter of fact, was only partially disabled."

It is true as stated in the above paragraph, that in his complaint the plaintiff originally claimed *that his hand* by reason of the injury, had been totally and permanently disabled.

But this allegation *was not* amended.

The only amendments made were as detailed on pages 66 and 67 Transcript of Record, and refer plainly to the disability of the plaintiff himself, and not to the disability of his hand.

Although in the printed Transcript of Record the word "partially" appears in paragraph IV of the complaint, an inspection of the original complaint, which will be before this Court under Rule 13, will show that this is an error and that the word "totally" should be read where the word "partially" appears.

So that the plaintiff did not, as asserted in the brief of Plaintiff in Error, at any time admit that the injury to his hand resulted in only a partial disability of that member and the lengthy and involved argument of Plaintiff in Error, based on this erroneous assumption of an admission, necessarily falls and requires no answer. Not only did we make no such admission of only a partial disability of the hand, but as said in our statement of the case there was sufficient evidence to warrant the jury in finding that the hand was totally disabled for practical use, and

to warrant the express finding of the jury that the injury to the hand diminished plaintiff's earning capacity more than if the hand had been severed between the wrist and elbow.

Opposing counsel does not question the decision of this Court in Fern Gold Mining Company vs. Murphy, 7 Fed. (2nd.) 613, to the effect that an employe might suffer total and permanent disability from an injury to a limb without the actual loss of the limb.

How then can it be out of reason to contend that an employe might suffer a partial and permanent disability by an injury to a limb without the actual loss of the limb, and that the disability, though not total, might be greater than would have followed the actual loss of the limb?

If one can be disabled totally or 100% by an injury to a member without the actual loss of the member, surely the same person can be disabled 90% or less, by an injury to a member, without the actual loss of the member.

To avoid confusion it should be kept clearly in mind, that the Workman's Compensation Act of Alaska prescribes a schedule of compensation for certain injuries designated therein, which is absolutely arbitrary, while in another class of cases, such as the case now before this Court, the amount of compensation is made to depend on the proof furnished as to the degree of disability.

With reference to the first class of cases the

compensation allowed by the Act, for injuries to a single man, without dependents, is as follows:

For the loss of a thumb	$ 624.00
" " " " an index finger	390.00
" " " " a hand	1872.00
" " " " an arm	2340.00
" " " " a foot	1872.00
" " " " a leg	2340.00
" " " " an eye	1872.00
" " " " an ear	312.00

The compensation allowed for each of these and other specified injuries has no direct relation to the loss of earning capacity, and in some of them no relation at all, as for instance in the case of the loss of an ear, but as before stated it is an absolutely arbitrary schedule.

The other provision of the Act, the one under which plaintiff seeks compensation is as follows: (Chapter 98, Session Laws of Alaska, 1923)

> "Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the

amount to be paid in no case to exceed Six Thousand Two Hundred Forty Dollars ($6,240.00)."

Under the last provision quoted the compensation is not and necessarily cannot be fixed and arbitrary; it depends upon the degree of impairment of earning capacity, which must be established by evidence, and which in the nature of things cannot be exactly measured, but must be approximate.

Furthermore the measure of damages under this provision has no relation to the arbitrary measure in the schedule an extract from which is above set forth. The damage resultant from an injury to hand or arm or leg cannot be measured with reference to the compensation allowed for the loss of such member. It is measured by the loss of earning capacity and by that alone. Moreover such compensation cannot be limited by the amount arbitrarily fixed and allowed for the loss of the member.

To illustrate, in the case of a single man without dependents the Act allows the sum of $1872.00 for the loss of a hand.

A single man suffering total disability would receive as compensation under the Act $4680.00.

The loss of the hand might easily cause a 50% loss of earning capacity, yet the compensation is fixed at $1872.00 for such injury, while if he were allowed for a 50% loss of earning capacity

he might receive 50% of $4680.00 or $2340.00.

But if the same man suffered a total disability of the hand, without the loss of that member, he would be entitled to receive 50% of $4680.00, or $2340.00, if he could prove 50% loss of earning capacity.

This single man by the loss of a thumb might suffer no loss of earning capacity whatever, yet under the arbitrary schedule he would be entitled to receive $624.00.

It is evident in the cases involving the loss of members, the schedule is arbitrary and has nothing to do with loss of earning capacity.

It is equally evident that in the second class of cases, which, in the language of the Act, "does not come wholly within any of the specific cases for which provision is made" the compensation is based on impairment of earning capacity, and the schedule has nothing to do with it.

It seems to be assumed throughout the brief of Plaintiff in Error that the plaintiff in the court below must measure his damages, resulting from the injury to his hand, within the limits of an amount fixed by the Act as the compensation for the loss of a hand.

In other words, no matter what the circumstances of the case might be, no matter what the evidence might show the loss of earning capacity to be, no matter that the Act bases the compensation on loss of earning capacity and that alone,

and fixes the limit of award at $6240.00, the Plaintiff in Error asks this Court to legislate, and substitute another limit of recovery, a limit prescribed in the schedule for another class of injury.

In Fern Gold Mining Company vs. Murphy this Court said:

> "It is obvious that an injury to a leg may be such as to cause total and permanent disability."

It will no doubt be conceded that if an injury to a leg may cause total or 100% disability, that an injury to a leg may cause anything less than total disability, as for instance 65% disability, in which case a single man would be awarded 65% of $4680.00 or $3040.00. But for the loss of such leg a single man would be allowed only $2340.00. Neither in the case of total or partial and permanent disability caused by an injury to a leg, is the amount of compensation limited by the amount recoverable for the loss of such member. The same rule necessarily applies to a hand or an arm; the limit of liability in any case of injury not involving the loss of the member being fixed by the Act at $6240.00 for partial and permanent disability.

In this case the jury made the special finding that the injury to plaintiff's hand diminished his earning capacity more than if the hand had been completely severed between the wrist and elbow.

This finding was based on the positive testimony of one of the doctors and on that of the plaintiff himself.

The jury found that the injury to plaintiff's hand diminished his earning capacity to the extent of 65%.

The injury to plaintiff's hand was such as not to come wholly within the specific cases for which provision is made in the Act; hence by the express terms of the Act the compensation allowed must be based on loss of earning capacity.

The verdict was not wrong as a matter of law. It must stand if there was sufficient evidence to support it.

In this regard there was not only testimony to the effect that the injury to plaintiff's hand caused a greater incapacity for working than would have resulted from the loss of the hand, there was also testimony to the effect that the injury caused atrophy of the arm and impaired the health, nervous system and general physical strength of the plaintiff.

V.

THE COURT ERRED IN ENTERING ANY JUDGMENT AGAINST THE DEFENDANT IN ANY EVENT IN A GREATER SUM THAN FOUR THOUSAND FIFTY SIX DOLLARS ($4,056.00) LESS THE SUM OF TWO HUNDRED EIGHTEEN DOLLARS ($218.00) PAID THE PLAINTIFF BY DEFENDANT.

The jury having found that plaintiff suffered a 65% loss of earning capacity, on this basis judgment was entered for $4852.00.

This was computed by the trial court, and correctly, by taking 65% of $7800.00, which is $5070.00 and deducting therefrom $218.00, the amount paid to plaintiff, leaving $4852.00.

The court could have taken no other sum as the basis of computation, than the sum of $7,800.00, that being the amount plaintiff would have been entitled to recover if he had been totally and permanently disabled, as he belonged to the class described in the Act in Chapter 98, Session Laws of Alaska, 1923, page 238, as follows:

> "(A) If such employee was at the time of his injury married he shall be entitled to receive Six Thousand Two Hundred Forty Dollars ($6,240.00) with Seven Hundred Eighty Dollars ($780.00) additional for each child under the age of Sixteen (16) years, but the total to be paid shall not exceed Seven Thousand Eight Hundred Dollars ($7,800.00)."

Plaintiff, therefore, belonged to a class entitled to recover $7800.00 for total and permanent disability. That portion of the Act which fixes plaintiff's compensation for partial and permanent disability is found on page 241 of Chapter 98, Session Laws of Alaska, 1923, and is as follows:

"Whenever such employee receives an injury arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Six Thousand Two Hundred Forty Dollars ($6,240.00).

"To illustrate: If said employee were of a class that would entitle him or her to Six Thousand Two Hundred Forty Dollars ($6,240.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five (25%) per cent, he or she would be entitled to receive One Thousand Five Hundred Sixty Dollars ($1,560.00), it being the amount that bears the same relation to Six Thousand Two Hundred Forty Dollars ($6,240.00) that Twenty-five (25%) per cent does to one hundred (100%) per cent. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per cent, he or she would be entitled to recive Four Thousand Six Hundred Eighty Dollars ($4,680.00), it being the amount that bears the same relation to Six Thousand Two Hundred

> Forty Dollars ($6,240.00) that seventy-five (75%) per cent does to one hundred (100%) per cent."

There is no basis whatever for the contention that the sum of $6240.00 should be the basis of computation. That sum is simply the maximum of recovery for partial and permanent disability. Had the plaintiff proved a 90% loss of earning capacity his recovery would not be 90% of $7,800.00, or $7020.00, but would be scaled to the statutory limit of $6240.00.

Had the plaintiff belonged to a class which would entitle him to $6240.00 for total and permanent disability, that sum would have been the basis of computation. But he did not belong to such a class. To belong to the $6240.00 class he would have to be either a married man without children, a single man with dependent parents, or a widower with two children under sixteen years of age.

He belonged to none of these classes, but did belong to the $7800.00 class.

Counsel for Plaintiff in Error seems confused because the sum of $6240.00 is the amount specified in the statute as the limit of liability for partial and permanent disability, and is also the amount taken and used in the Act to illustrate the application of the law.

But any other amount might have been fixed as the limit of recovery, and any other class and

corresponding amount might have been used for illustration, yet under the terms of the Act the amount of plaintiff's recovery would not be affected, except in so far as thus limited by the statute.

To illustrate: If the Act specified $5460.00 as the limit of recovery for partial and permanent disability, and the plaintiff belonged to the $6,240.00 class he would be entitled to recover 65% of $6240.00, but belonging to the $7800.00 class he would be entitled to recover 65% of $7800.00.

And this result would not be affected if the sum of $5460.00 had been used in the statutory illustration.

If the limit of recovery were $4000.00 the compensation would be still computed by taking 65% of $7800.00, or $5070.00, but that sum would have to be scaled to the statutory limit of $4000.00.

In other words the statutory limit of recovery for partial and permanent disability has nothing to do with computing the amount to be paid in any given case, except to limit the same.

It is true that in its instructions the Court took the sum of $6240.00 in its illustration and that the jury or some of them may have had that sum in mind during their deliberations.

But it was put squarely up to the jury to find the percentage of loss of earning capacity suffered by the plaintiff and it is by no means to be presumed that they were influenced in that

finding by any other consideration than the evidence in the case. They were not directed or permitted to fix the amount of recovery, but were directed to find the percentage of loss of earning capacity suffered by the plaintiff, which they did, fixing that loss at 65%, and having so found that percentage the court was bound by the Act to enter judgment for 65% of what plaintiff would have been entitled to recover had he been totally and permanently disabled, less the amount already paid him.

Even if the court inadvertently or erroneously mentioned the sum of $6240.00, in illustration of the application of the Act, and even assuming that the jury were consequently under a wrong impression as to the amount of recovery which would follow their finding of 65% loss of earning capacity, no exception or objection was taken to the instructions in this respect; but the jury should not have been influenced in their finding by any consideration as to the amount of recovery, and as stated before, it is not to be presumed that they were.

IN CONCLUSION we contend that the evidence justified the findings of the jury:

First: That the plaintiff was disabled more than he would have been by the complete loss of his hand, and

Second: That plaintiff suffered a loss of earning capacity of 65%.

And we maintain that the amount of the judgment was correctly computed by the Court, on the findings of the jury.

Respectfully submitted,

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